

**CUEA CLS 301  
JAN TO APRIL 2017  
HIV & AIDS Law  
CLASS PRESENTATIONS  
CHARLES B G OUMA LLB MLB  
LECTURER FACULTY OF LAW CUEA**

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## Presentation Outline

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Introduction to the course</li> <li>2. About HIV-AIDS</li> <li>3. The situation in Kenya</li> <li>4. Legal, policy and institutional framework</li> <li>5. Human rights issues</li> <li>6. HIV AIDS and the right to health</li> <li>7. Counselling, testing and treatment</li> <li>8. Confidentiality and privacy</li> <li>9. HIV AIDS issues at the workplace</li> <li>10. HIV AIDS issues in marriage</li> </ol> | <ol style="list-style-type: none"> <li>11. Rights of Key Populations               <ul style="list-style-type: none"> <li>• Women</li> <li>• Children and youth</li> <li>• people who use drugs.</li> <li>• Adults engaged in commercial sex</li> <li>• Men who have sex with men, and transgender people</li> <li>• People under State custody</li> </ul> </li> <li>12. Criminalization</li> <li>13. The HIV AIDS Tribunal</li> <li>14. Remedies for violation</li> </ol> |
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## CUEA CLS 301 HIV & AIDS Law

### 1. INTRODUCTION TO THE COURSE

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## Course Description

- The course aims at introducing students to approaches to HIV and AIDS LAW across the East African region, the social, economic and legal problems posed by HIV/AIDS and the possible ways that the law (particularly human rights law) can address such issues

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## Expected Learning Outcomes

- At the end of the course, students should be able to:
  1. **Give** a broad overview of the HIV & AIDS situation in Kenya
  2. **Outline** the legal, policy and institutional framework on HIV & AIDS in Kenya
  3. **Identify** the broad legal issues in HIV & AIDS in Kenya
  4. **Analyse** the rights of persons living with HIV & AIDS in Kenya
  5. **Evaluate** the manner in which the law protects persons living with HIV & AIDS from stigmatization and discrimination
  6. **Evaluate** the extent to which access to justice is facilitated for persons living with HIV & AIDS in Kenya
  7. **Discuss** the manner in which the Kenyan criminal justice system interacts with HIV & AIDS
  8. **Review** the jurisprudence on HIV & AIDS in Kenya and identify emerging issues and themes
  9. **Give** sound advice and opinion on the legal issues on HIV & AIDS

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## Assessment

- CAT 30%
  - Sit in open book 15%
  - Project/Presentation 15%
- Written Exam 70%

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## Readings

- The HIV and AIDS Tribunal Compendium of cases [www.ke.undp.org/content/.../the-hiv-and-aids-tribunal-compedium-of-cases.html](http://www.ke.undp.org/content/.../the-hiv-and-aids-tribunal-compedium-of-cases.html)
- Compendium of judgments: Background Material. Judicial Dialogue on HIV, Human Rights and the Law in Eastern and Southern Africa Nairobi, Kenya, 28–31 October 2013 [www.undp.org/.../HIV.../Governance%20of%20HIV%20Responses/Compendium%20of...](http://www.undp.org/.../HIV.../Governance%20of%20HIV%20Responses/Compendium%20of...)

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## Useful online sources of information

1. HIV & AIDS Tribunal [www.judiciary.go.ke/portal/page/hiv-and-aids-tribunal](http://www.judiciary.go.ke/portal/page/hiv-and-aids-tribunal)
2. National AIDS Control Council <http://nacc.or.ke/>
3. Kenya Legal and Ethical Issues Network on AIDS <http://www.kelinkenya.org/>
4. UNAIDS [www.unaids.org](http://www.unaids.org)
5. Kenya Law Reports <http://kenyalaw.org/caselaw/>

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## CUEA CLS 301 HIV & AIDS Law

### 2. ABOUT HIV & AIDS

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## About HIV & AIDS

- **What is HIV?**
- HIV stands for human immunodeficiency virus. It is the virus that can lead to acquired immunodeficiency syndrome or AIDS if not treated. Unlike some other viruses, the human body can't get rid of HIV completely, even with treatment. So once you get HIV, you have it for life.
- Virus attacks the body's immune system, specifically the CD4 cells(T cells)
- Person becomes more vulnerable to opportunistic infections and cancers

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## About HIV & AIDS

- **What is HIV AIDS ?**
- **Section 2 HIV and AIDS Prevention Control Act**
- "Acquired Immune Deficiency Syndrome (AIDS)" means a condition characterized by a combination of signs and symptoms, resulting from depletion of the immune system caused by infection with the Human Immunodeficiency Virus (HIV);

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## About HIV & AIDS

- **Where did HIV Come from?**
- Scientists identified a type of chimpanzee in Central Africa as the source of HIV infection in humans
- Detected in the US in the 1970s
- Became a major issue and assumed epidemic status in the 90s
- **How do I know if I have HIV?**
- The only way to know for sure whether you have HIV is to get tested.
- Knowing your status is important because it helps you make healthy decisions to prevent getting or transmitting HIV.

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## About HIV & AIDS

- **Is there a cure for AIDS?**
- No effective cure currently exists for HIV. But with proper medical care, HIV can be controlled.
- Treatment for HIV is called antiretroviral therapy or ART.
- If taken the right way, every day, ART can dramatically prolong the lives of many people infected with HIV, keep them healthy, and greatly lower their chance of infecting others.
- Before the introduction of ART in the mid-1990s, people with HIV could progress to AIDS (the last stage of HIV infection) in a few years.
- Today, someone diagnosed with HIV and treated before the disease is far advanced can live nearly as long as someone who does not have HIV.

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## CUEA CLS 301 HIV & AIDS Law

### 3. THE SITUATION IN KENYA

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## The situation in Kenya

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## CUEA CLS 301 HIV & AIDS Law

### 4. LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK ON HIV & AIDS

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## Legal Framework

- **Legal Framework**
- **The Constitution of Kenya 2010**
  - Chapter IV Bill of Rights
- **Main Statute**
  - HIV AIDS Prevention and Control Act
- **Related Statutes**
  - Sexual Offences Act Section 26 36
  - Criminal Procedure Code
- **Institutional Statute**
  - Legal Notice 170 of 1999
  - Legal Notice no 4 Of 2000
  - Legal Notice 156 of 2009

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## Legal, policy and institutional framework on HIV & AIDS

- **Policy Framework-Domestic**
- 1. Vision 2030
- 2. The Kenya AIDS Strategic Framework 2014/15-2018/19
- 3. NACC Strategic Plan 2014/2015-2018/2019
- 4. Monitoring and Evaluation Framework for the Kenya AIDS Strategic Framework 2014/15-2018/19
- 5. Unified HIV Response Information System
- 6. Kenya HIV Prevention Roadmap
- 7. National guidelines for HIV testing and counselling for couples and prevention with positives,
- 8. HIV Control and Promotion of Maternal, Newborn and Child Health in Kenya 2013- 2017,
- 9. The strategic framework for Elimination of Mother to Child Transmission of HIV and Keeping Mothers Alive 2012-2015,

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## Legal, policy and institutional framework on HIV & AIDS

- **International**
- 1. Universal Declaration on Human Rights
- 2. International Covenant on Civil and Political Rights
- 3. International Covenant on Economic, Social and Cultural Rights
- 4. International Convention on the Rights of the Child.
- 5. International Convention on the Elimination of All Forms of Discrimination Against Women
- 
- 6. UNGASS Declaration on HIV/AIDS.
- 7. Millennium Development Goals
- 8. 2006 UN General Assembly political declaration on HIV/AIDS
- 9. 2011 UN General Assembly political declaration on HIV AND AIDS
- 10. United Nations Sustainable Development Goals
- 11. UNAIDS 2016–2021 Strategy
- 12. 2016 high-level meeting on HIV/AIDS

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## Legal, policy and institutional framework on HIV & AIDS

- **Key Institutions**
- 1. Ministry of Health
- 2. National AIDS and STI Control Program(NASCOP)
- 3. National AIDS Control Council(NACC)
- 4. County HIV Coordination Unit
- 5. County HIV Executive Committee (CEC)
- 6. County AIDS and STI Coordinating Officer(CASCO)
- **Monitoring and evaluation**
- 1. National KASF Monitoring Committee
- 2. County KASF Monitoring Committee
- 3. ICCs for HIV and AIDS for National and County Levels

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## CUEA CLS 301 HIV & AIDS Law

### 5. HIV & AIDS & HUMAN RIGHTS ISSUES

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## HIV & AIDS & Human Rights Issues

1. Access to essential services
2. Equality of PLHIV in public and private life
3. Rights of key populations
4. Access to justice
5. Non-criminalization

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## HIV & AIDS & Human Rights Issues

- **Access to Essential Services**
- Public Education, Research, and Information Exchange
- HIV Prevention
- Testing, Counseling, and Referral
- Treatment, Care, and Other Health Services
- Social Protection and Material Assistance
- Protection of Privacy and Confidentiality

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## HIV & AIDS & Human Rights Issues

- **Equality of PLHIV in Public and Private Life**
- Political, Social, and Cultural Life
- Family, Sexual, and Reproductive Life
- Education and Training
- Employment, Work, and Economic Life
- Public and Private Housing
- Entry, Stay, and Residence
- Non-Criminalization of HIV Exposure and Transmission

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## HIV & AIDS & Human Rights Issues

### • Rights of Key Populations

- Women
- Children and Youth
- People who Use Drugs
- Adults Engaged in Commercial Sex
- Men who Have Sex with Men, and Transgender People
- People under State Custody

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## HIV & AIDS & Human Rights Issues

### • Access to Justice

- Legal Protections
- Legal Awareness, Assistance, and Representation
- Access to a Forum, Fair Trial, and Enforcement of Remedies

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## HIV & AIDS & Human Rights Issues

### • Non criminalization

- Criminalization and stigmatization
- Criminalization as a barrier to access to essential services

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## HIV & AIDS & Human Rights Issues

### • Specific rights of PLWHA

- Right to non-discrimination and equality before the law
- Right to liberty and security of person
- Right to privacy
- Right to marry and to found a family.
- Right to education.
- Right to work
- Right to life.
- Right to the highest attainable standard of physical and mental health.
- Right to an adequate standard of living and social security
- Right to enjoy the benefits of scientific progress and its applications.
- Freedom of expression and information
- Freedom of assembly and association.
- Right to non-criminalization

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## CUEA CLS 301 HIV & AIDS Law

### 6. HIV & AIDS & THE RIGHT TO HEALTH

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## HIV & AIDS & the Right To Health

### • What is a human right?

- The United Nations Office of the High Commissioner for Human Rights ( UNOHCHR) defines a human right as follows;
  - 'Human rights are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity. Human rights law obliges Governments (principally) and other duty-bearers to do certain things and prevents them from doing others'
- Therefore a 'human right' is anything (item/ good or service) that a human being requires in order to survive and live in dignity.

## HIV & AIDS & the Right To Health

- **What is health?**
- The World Health Organization's constitution defines it as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'

## HIV & AIDS & the Right To Health

- **What is the Human Right to Health?**
- Based on the above definition of a right, there is no debate as to whether or not health is a right.
- It is clear that health is critical to survival and living in dignity.
- Enjoyment of the human right to health is vital to all aspects of a person's life and well-being, and is crucial to the realization of many other fundamental human rights and freedoms

## HIV & AIDS & the Right To Health

- **Components of the right to health**
- 1. The human right to the highest attainable standard of physical and mental health, including reproductive and sexual health.
- 2. The human right to equal access to adequate health care and health-related services, regardless of sex, race, or other status.
- 3. The human right to equitable distribution of food.
- 4. The human right to access to safe drinking water and sanitation.
- 5. The human right to an adequate standard of living and adequate housing.

## HIV & AIDS & the Right To Health

- **Components of the right to health**
- 6. The human right to a safe and healthy work place and to adequate protection for pregnant women in work proven to be harmful to them.
- 7. The human right to freedom from discrimination and discriminatory social practices, including female genital mutilation, prenatal gender selection, and female infanticide.
- 8. The human right to education and access to information relating to health, including reproductive health and family planning to enable couples and individuals to decide freely and responsibly all matters of reproduction and sexuality.
- 9. The human right to education and access to information relating to health, including reproductive health and family planning to enable couples and individuals to decide freely and responsibly all matters of reproduction and sexuality.
- 10. The human right of the child to an environment appropriate for physical and mental development

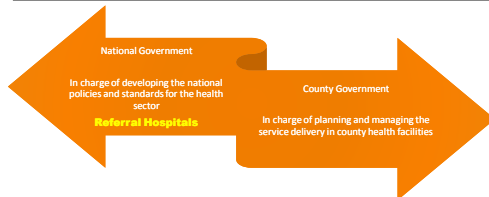
## HIV & AIDS & the Right To Health

- **Constitutional basis**
- Article 43 CoK 2010
- 43. (1) Every person has the right—
- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- **Other Legal instruments**
- Article 25 UDHR
- WHO Constitution
- Article 12 ICESCR
- African Charter on Human and Peoples' Rights (ACHPR)

## HIV & AIDS & the Right To Health

- **Judicial Interpretation of the right**
- **Luco Njagi & 21 others v Ministry of Health & 2 others Nairobi Constitution and Human Rights Division Petition NO. 218 OF 2013 [2015] eKLR**
- The consolidated petition sought mandatory orders to compel the Ministry of Health to meet the cost of medical dialysis on their behalf at eight private medical facilities namely the Nairobi Hospital, the Nairobi Women's Hospital, The Aga Khan, MIP Shah, Mater, Nairobi West and Karen hospitals, and at the Parklands Dialysis Centre, or to subsidise the cost of medical dialysis at the named private medical facilities at the rate at which the petitioners would have accessed treatment at Kenyatta National Hospital
- It was their case that they could not afford healthcare from other service providers and their rights to health had been infringed. They submit that require dialysis treatment three times a week in order to live, but have been unable to access the treatment at Kenyatta National Hospital due to a lack of adequate machines and/or failure of existing machines; and that they are poor people and cannot afford to pay for dialysis at private medical providers

### HIV & AIDS & the Right To Health The Duty Bearers: Functions with Respect to the Right to Health (Source Kelin)



### HIV & AIDS & the Right To Health

- The Duties
- Article 21
- 21. (1) It is a fundamental duty of the State and every State organ to **observe, respect, protect, promote** and fulfil the rights and fundamental freedoms in the Bill of Rights.
- (2) The State shall take **legislative, policy and other measures**, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.
- (3) **Vulnerable groups**
- (4) Legislation to implement international obligations

### HIV & AIDS & the Right To Health

- The Duties
- 20(5) burden of proof of non availability of resources is on the state
- 20(5)(a) state to prioritise fundamental rights in allocating resources
- 20(5)(b) courts to respect the policy decisions of the state
- Other duty bearers
  - Parliament and county assemblies
  - Make laws
  - Judiciary:
  - Enforce the right and facilitate access to justice

### HIV & AIDS & the Right To Health

- The Duties
- Schedule 4 CoK 2010
- National Government
- Sh 4 23 National referral health facilities
- Sch 4 28 28. Health policy.

### HIV & AIDS & the Right To Health

- The Duties
- Schedule 4 CoK 2010
- Sch 4 2. County health services, including, in particular—
  - (a) county health facilities and pharmacies;
  - (b) ambulance services;
  - (c) promotion of primary health care;
  - (d) licensing and control of undertakings that sell food to the public;
  - (g) refuse removal, refuse dumps and solid waste disposal

### HIV & AIDS & the Right To Health

- Judicial Interpretation of the right: Obligations of duty bearers
- 1. Soobramoney –vs- Minister of Health Kwa Zulu Natal 1997 (12) BCLR 1696
- 2. Minister of Health –vs- Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC) (SA)
  - Announced the test the court should use in determining the state's obligation on social economic rights.
- 3. Mariela Viceconte –vs- Ministry of Health and Social Welfare Case No 31.777/96, (Argentina)
  - The court set a deadline for the state to meet its obligation to manufacture a vaccine for a hemorrhagic fever
- 4. Mendoza and Ors –vs- Ministry of Public Health Resn No 0749-2003-RA (28 Jan 2004) [Ecuador].
  - The court held that the Ministry of Health had failed in its obligations to protect the petitioners' right to health, which forms part of the right to life, by suspending a HIV treatment programme

### HIV & AIDS & the Right To Health

- **Judicial Interpretation of the right: Obligations of duty bearers**
- **Luco Njagi & 21 others v Ministry of Health & 2 others Nairobi Constitution and Human Rights Division Petition NO. 218 OF 2013 [2015] eKLR**
- Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."

### HIV & AIDS & the Right To Health

- **Judicial Interpretation of the right: Obligation of duty bearers**
- **Luco Njagi & 21 others v Ministry of Health & 2 others Nairobi Constitution and Human Rights Division Petition NO. 218 OF 2013 [2015] eKLR**
- Held
- In the present case, I am satisfied, on the material before me, that the measures taken by the respondents to ensure access to haemodialysis by the petitioner are **reasonable** in the circumstances. I am not therefore able to issue the orders that the petitioners seek. Their petition is therefore dismissed, but with no order as to costs.

### HIV & AIDS & the Right To Health

- **Access to health facilities and medical care**
- **Georgina Ahamefule v. Imperial Medical Centre**
- The Plaintiff was a nurse at a medical centre. Defendants were the medical centre and a doctor at the centre. The plaintiff tested positive for HIV. Her services were terminated "based on humanitarian grounds," "or reasons of public safety". The plaintiff claimed the Defendants denied her access to medical care at the medical centre and refused to perform the requisite cleaning operation following the miscarriage because of her HIV status.

### HIV & AIDS & the Right To Health

- **Access to health facilities and medical care**
- **Georgina Ahamefule v. Imperial Medical Centre**
- 11(1) and (2) of the Protection of Persons Living with HIV/AIDS Law of Lagos State guarantees employment to people living with HIV, and that section 14(1) of that law provides that any person discriminated against on the basis of HIV can sue in a court of competent jurisdiction. The plaintiff also relied on articles 2 & 16 of the African Charter on Human and Peoples' Rights Charter and article 12 of the International Covenant on Economic, Social and Cultural Rights
- **Held**
- Defendants' action in denying the plaintiff medical care on grounds of her HIV positive status constituted a flagrant violation of the right to health' guaranteed under article 16 of the charter, act cap.10 laws of the Federation Of Nigeria and article 12 of the ICESCR.

### HIV & AIDS & the Right To Health-Access to medicine

- **Access to medicine**
- **P.A.O. & 2 others v Attorney General [2012] eKLR**
- This petition raises critical issues pertaining to the constitutional right of citizens to the highest attainable standard of health. The petitioners are all citizens of Kenya who describe themselves as living positively with HIV/AIDS. They are apprehensive that their rights under the Constitution are threatened by the enactment of the Anti-Counterfeit Act, 2008, specifically sections 2, 32 and 34 thereof. They see these provisions as affecting or likely to affect their access to affordable and essential drugs and medicines including generic drugs and medicines thereby infringing their fundamental right to life, human dignity and health as protected by Articles 26(1), 28 and 43 of the Constitution of Kenya.

### HIV & AIDS & the Right To Health-Access to medicine

- **Access to medicine**
- **P.A.O. & 2 others v Attorney General [2012] eKLR**
- **Held**
- (a) The fundamental right to life, human dignity and health as protected and envisaged by Articles 26(1), 28 and 43(1) of the Constitution encompasses access to affordable and essential drugs and medicines including generic drugs and medicines
- (In so far as the Anti Counterfeit Act, 2008 severely limits or threatens to limit access to affordable and essential drugs and medicines including generic medicines for HIV and AIDS, it infringes on the petitioners' right to life, human dignity and health guaranteed under Articles 26(1), 28 and 43(1) of the Constitution.
- (c) Enforcement of the Anti Counterfeit Act, 2008 in so far as it affects access to affordable and essential drugs and medication particularly generic drugs is a breach of the petitioners' right to life, human dignity and health guaranteed under the Constitution.



## HIV & AIDS & the Right To Health

- Access to medical facilities
- **Luco Njagi & 21 others v Ministry of Health & 2 others Nairobi Constitution and Human Rights Division Petition NO. 218 OF 2013 [2015] eKLR**
- The obligation of the duty bearer to provide facilities within its budgetary constraints. Courts will hesitate to interfere with the policy choices of the duty bearers

## CUEA CLS 301 HIV & AIDS Law

### 7. COUNSELLING, TESTING AND TREATMENT

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## Testing-HAPCA

- **PART IV – testing, screening and access to healthcare services**
- S 13. Prohibition against compulsory testing.
- S 14. Consent to HIV testing.
- S 15. Provision of testing facilities.
- S 16. Testing centres.
- S 17. Pre-test and post-test counselling.
- S 18. Results of HIV test.
- S 19. Access to healthcare services
- 35. Exclusion from credit and insurance services

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## Testing-HAPCA

- **Section 13 Prohibition against testing as a precondition to, or for the continued enjoyment of—**
- (a) employment;
- (b) marriage;
- (c) admission into any educational institution;
- (d) entry into or travel out of the country; or
- (e) the provision of healthcare, insurance cover or any other service

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## Testing-HAPCA

- **S 14. Consent to HIV testing**
- Informed consent necessary
- Parent or guardian may give consent
- Child may give consent in certain circumstances

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## Testing-HAPCA

- **S 14. Persons deemed to have consented**
- a person who offers to donate any tissue
- a person who offers to donate blood
- **S 14. Testing with consent of another**
- if, **in the opinion of the medical practitioner who wishes to undertake the HIV test**, the other person has a disability by reason of which he **appears incapable of giving consent**, with the consent of—
- (i) a guardian of that person;
- (ii) a partner of that person;
- (iii) a parent of that person; or
- (iv) an adult offspring of that person

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## Testing-HAPCA

- S 14(2)(c). Testing without consent
- Provided that a medical practitioner may undertake the HIV test if the persons referred to in paragraphs (i), (ii), (iii) and (iv) of section 14(1)(c) **are either absent or are unwilling to give consent**
- Medical officer may undertake HIV test without consent if (i) the person is unconscious and unable to give consent; and (ii) the medical practitioner **reasonably believes that such a test is clinically necessary or desirable in the interest of that person.**

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## Testing-HAPCA

- **Compulsory testing**
- S 14(2)(c). a person charged with an offence of a sexual nature under the Sexual Offences Act, 2006 (No. 3 of 2006)
- S 14(2)(d). where the person is required to undergo an HIV test under the provisions of this Act or any other written law

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## Testing-HAPCA

- **Testing centers**
- No test except in a testing centre approved by the Minister
- No person to conduct test unless such person is a healthcare provider approved by the Minister for that purpose
- No person to provided pre-test or post-test counselling for the purposes of section 17 unless such person is approved by the Minister under section 16

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## Testing-HAPCA

- **Regulations on testing**
- S 16 (4) The Minister shall, in regulations, prescribe—
- (a) the standards and the procedure for the approval of testing centres for the purposes of this Act;
- (b) the standards and the procedure for the approval of healthcare providers for the purposes of subsection (2);
- (c) guidelines for the provision of pre-test and post-test counselling services at such centres, including the standards and the procedure for approval of persons qualified to provide such services; and
- (d) guidelines for self testing

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## Testing-HAPCA

- **17. Pre-test and post-test counselling**
- testing centre to provide pre-test and post-test counselling to a person undergoing an HIV test and any other person likely to be affected by the results of such test

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## Testing-Sexual Offences Act

- **C O L & another v Resident Magistrate - Kwale Court & 4 others \_Mombasa Constitutional and Judicial Review Division Petition No. 51 OF 2015 [2016] eKLR**
- COI and GMN sought the following orders, inter alia :-
- (3) a declaration that the act of forced examination of the Petitioners by way of nonconsensual anal examination, HIV testing and Hepatitis B testing by the 3rd Respondent through the directive of the First and Second Respondents amounted to a violation of the human and constitutional rights of the Petitioners as outlined in the Petition;
- (5) a declaration that nonconsensual medical examination of the nature herein or of any form are a violation of the right to privacy and of the right to health as provided for under the Constitution.
- **Held:** the medical examination of the Petitioners and taking of samples was in accord with the applicable law, and I find no violation of any of the Petitioners rights as contended in the Petition (**Per Anyara Emukule J**)

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### Testing-Sexual Offences Act

- **Antony Murithi v O.C.S Meru Police Station & 2 others [2012] EKLK**
- A compulsory test might lead to exclusion of evidence if found to be in violation of a fundamental right

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### Testing

- **C.N.M -vs- The Karen Hospital Limited** HIV and AIDS Tribunal at Nairobi Case No. HAT 008 of 2015
- The Claimant visited the Respondent hospital to seek treatment for severe diarrhoea. She was subsequently subjected to a HIV test without her informed consent which test indicated that she was HIV positive. In their response, the Respondent alleged that before and after admission of the Claimant, **several tests were carried out on her and among them was HIV testing** which complied with the National Guidelines for HIV testing and counseling in Kenya
- Held
- Where a person is **induced to donate blood under the mistaken belief** that it will be used for other tests (apart from HIV testing) and it is used for HIV testing then **that patient has been compulsorily tested for HIV**. Therefore, the HIV testing that was done on the claimant, alongside other tests, violated the provisions of Section 13 of HAPCA

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### Testing

- **C.N.M -vs- The Karen Hospital Limited** HIV and AIDS Tribunal at Nairobi Case No. HAT 008 of 2015
- The Claimant visited the Respondent hospital to seek treatment for severe diarrhoea. She was subsequently subjected to a HIV test without her informed consent which test indicated that she was HIV positive. The Claimant was soon to learn from her attending Doctor that information of her HIV status had been shared with her Insurance Company. The hospital argued that the test was in the best interest of the claimant
- Held
- All HIV testing carried out in the course of normal treatment procedures (whether before or after the onset of HIV-related symptoms) **must be conducted only after the patient has given his or her informed consent** thereto and all other provisions of HAPCA must be strictly complied with.

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### Testing

- **C.N.M -vs- The Karen Hospital Limited** HIV and AIDS Tribunal at Nairobi Case No. HAT 008 of 2015
- The contention by the Respondent that the HIV tests conducted upon the Claimant would still have been lawful even if no consent was obtained prior to the tests because **they were in the patient's best interest was clearly mistaken, besides being preposterous**. Accordingly, the Tribunal held that a medical practitioner can only conduct a test on a person without that person's consent under sub-paragraph (ii) of Section 14(2) **(c) if that person is "unconscious and unable to give consent"**, as prescribed under sub-paragraph (i) of Section 14(2)(c) of HAPCA. No evidence was given by the respondents to prove that the claimant was unconscious and was therefore unable to give consent.

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## CUEA CLS 301 HIV & AIDS Law

### 8. CONFIDENTIALITY AND PRIVACY

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### Confidentiality/Privacy: HAPCA

- **PART V – confidentiality**
- 20. Privacy guidelines.
- 21. Confidentiality of records.
- 22. Disclosure of information.
- 23. Penalty for breach of confidentiality

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## Confidentiality/Privacy

### • 18. Results of HIV test

- The results of an HIV test shall be confidential and shall only be released to the persons listed in section 18
  - the tested person;
  - to a parent or legal guardian of a child (or the child himself/herself in certain cases)
  - in the case of a person under a disability
    - (i) The legal guardian
    - (ii) a partner of that person;
    - (iii) a parent of that person; or
    - (iv) an adult offspring of that person.

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## Confidentiality/Privacy: HAPCA

### • PART V – confidentiality

### • 20. Minister to prescribe privacy guidelines.

- (1) Minister to prescribe privacy guidelines including the use of an **identifying code**, relating to the recording, collecting, storing and security of information, records or forms used in respect of HIV tests and related medical assessments.
- (2) No person shall record, collect, transmit or store records, information or forms in respect of HIV tests or related medical assessments of another person otherwise than in accordance with the privacy guidelines
- **21. Exclusion of identifying information**
- Test records to exclude **information which directly or indirectly identifies the person to whom an HIV test relates**, except in accordance with the privacy guidelines prescribed under section 20.
- **22. Prohibition of disclosure except to listed persons under the listed circumstances**

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## Confidentiality/Privacy

### • C.N.M -vs- The Karen Hospital Limited HIV and AIDS Tribunal at Nairobi Case No. HAT 008 of 2015

- The Hospital conducted an HIV Test on the claimant. Medical bills forwarded to the insurance company for settlement revealed the claimants HIV status. The hospital denied that this amounted to disclosure of the patient's HIV status and maintained that they only sent medical bills to UAP insurance for settlement.
- Held
- Whether or not the forwarding of medical bills that reveal HIV status amounts to unauthorised disclosure is a question of fact
- In the instant case, the **Respondent violated the claimant's right to confidentiality** as protected under Section 22(1) of HAPCA.

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## Confidentiality/Privacy

### • E.M.A -vs- World Neighbours & Another Case No. HAT 007 of 2015 HIV and AIDS Tribunal at Nairobi

- The claimant filed a statement of claim stating that she was employed by World Neighbours, the 1<sup>st</sup> respondent, and at the time of employment she was provided with in-patient and out-patient health insurance supplied by the 2nd respondent. Two years into her employment she was admitted to hospital due to bacterial meningitis owing to her HIV sero-status. The hospital disclosed the test results to her employer and insurer.
- The disclosure of patients' HIV status by hospitals to medical insurers in Kenya was not only discriminatory but had also been subjected to gross abuse. Accordingly, there was need to determine the circumstances in which such disclosures ought to be made, as well as circumstances in which such disclosures could not be made.

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## Confidentiality/Privacy

### • E.M.A -vs- World Neighbours & Another Case No. HAT 007 of 2015 HIV and AIDS Tribunal at Nairobi

- Medical facilities and medical practitioners should only disclose the HIV status of their patients to the medical insurers when it was both necessary and justifiable having regards to the circumstances of the case. Where for example, an HIV positive patient was admitted to a medical facility suffering from cholera, and where the patient's viral load was still undetectable, it was neither necessary nor justifiable to disclose the patient's HIV status to the medical insurer.

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## Confidentiality/Privacy

### • E.M.A -vs- World Neighbours & Another Case No. HAT 007 of 2015 HIV and AIDS Tribunal at Nairobi

### • **Conditions under which disclosure may be necessary and authorised**

- a) Where the patient's viral load was so high that it militated against quick recovery and therefore increased the cost of treatment;
- b) Where the patient's HIV status was the sole or primary cause of the medical condition that was being treated;
- c) Where for any other reason the patient's HIV status or impact significantly affected on the costs of the medical treatment and therefore directly affected the interests both present and future of the medical insurer;
- d) Where recurrence of the problem in future was reasonably foreseeable owing, not merely as a matter of pure chance but on account the HIV status of the patient.

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### Confidentiality/Privacy

- **E.M.A -vs- World Neighbours & Another Case No. HAT 007 of 2015 HIV and AIDS Tribunal at Nairobi**
- The insurer violated the claimant's privacy and confidentiality in the following manner:
  - a) Requiring the claimant to disclose her HIV status on the proposal form as a condition of giving her a cover contrary to section 35 of HIV and AIDS Prevention and Control Act;
  - b) Requiring the medical facilities to disclose the claimant's HIV status to them;
  - c) Facilitating unauthorized disclosure of the claimant's HIV status to third parties to whom the Medical Report from Social Service League were copied.

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### Confidentiality/Privacy

- **C.N.M -vs- The Karen Hospital Limited Case No. HAT 008 of 2015 HIV and AIDS Tribunal at Nairobi**
- The Claimant visited the Respondent hospital to seek treatment for severe diarrhoea. She was subsequently subjected to a HIV test without her informed consent which test indicated that she was HIV positive. Later, she was tested with her husband and the results revealed that while she was HIV positive her husband was HIV negative. The Claimant was soon to learn from her attending Doctor that information of her HIV status had been shared with her Insurance Company.
- That forwarding an invoice or bill to a medical insurer violates section 22 of HAPCA if the HIV status of the patient treated can reasonably be inferred from such invoice or bill, and whether it is possible to infer the patient's HIV status from such invoice or bill is a question of fact that varies from one case to the other. Consequently, the Tribunal held and found that the Respondent violated the claimant's right to confidentiality as protected under Section 22(1) of HAPCA.

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### Confidentiality/Privacy

- **W.A -vs- Guru Nanak Ramgharia Sikh Hospital & 3 Others Case No. HAT 002 of 2015 HIV & AIDS Tribunal at Nairobi**
- The Claimant had been employed as a house caretaker by the 3rd Respondent before being reassigned the duties of a domestic servant by the 3rd and 4th Respondents. In 2011, he requested for lighter duties when his health began deteriorating. The medical checkup revealed that the Claimant was HIV positive and he was dismissed from employment on account of his status. The Claimant alleged that the 1st and 2nd Respondents (hospital and doctor respectively) had disclosed his HIV status to the 3rd and 4th Respondent without his knowledge and consent. The Claimant requested for damages for violation of his right to privacy and confidentiality.

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### Confidentiality/Privacy

- **C. O. N & Another -vs- Africa Medical and Research Foundation Case No. HAT 006 of 2013 HIV and AIDS Tribunal at Nairobi**
- The 1st Claimant alleged that sometime in November 2012, whilst in the course of employment with the Respondent, he was instructed to visit the Respondent's Communication Office at the head offices where a Program's Officer asked the Claimant to share with her the story of his life and health. That during the conversation, neither the Programs Manager nor any other agent of the Respondent informed the 1st Claimant that his story would be published in the Respondent's Information, Education and Communication Materials in the future. During the World AIDS Day on 1 December, 2012, the Respondent published the Information, Education and Communication Materials, being brochures with the 1st and 2nd Claimants' life and health stories as persons living with HIV

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### Confidentiality/Privacy

- **C. O. N & Another -vs- Africa Medical and Research Foundation Case No. HAT 006 of 2013 HIV and AIDS Tribunal at Nairobi**
- The publication of the Claimants' HIV status in the brochure impaired the Claimants' right to privacy under common law. Further, the publication of the Claimants' HIV status in the brochures without their knowledge and/or consent and distributing them in the Respondent's clinics was wrongful
- Even if the 1st Claimant knew or ought to have known that the information given would be published, he was nevertheless entitled to assume that consent would be sought prior to such subsequent publication because that was an explicit requirement of law. It would be unreasonable to expect the 1st Claimant to operate on the basis of the assumption that the Respondent would violate clear provisions of the law, given the status and experience of the Respondent.

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### Confidentiality/Privacy

- **C. O. N & Another -vs- Africa Medical and Research Foundation Case No. HAT 006 of 2013 HIV and AIDS Tribunal at Nairobi**
- A distinction had to be drawn between consent to share the Claimants' medical information with the Respondent, and consent to have the information (which was now in possession of the Respondent) shared with the public at large. **Even if the 1st Claimant knew or ought to have known that the information given would be published, he was nevertheless entitled to assume that consent would be sought prior to such subsequent publication because that was an explicit requirement of law.** It would be unreasonable to expect the 1st Claimant to operate on the basis of the assumption that the Respondent would violate clear provisions of the law, given the status and experience of the Respondent

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## Confidentiality/Privacy

### • B. O -vs- Meridian Equatorial Hospital Case No. HAT 005 of 2013 HIV and AIDS Tribunal at Nairobi

- Among the issues before the tribunal were:
  1. Whether it was wrong for the Respondent to disclose the HIV status of the Claimant to her mother without her consent;
  2. Whether the Respondent was entitled to disclose the Claimant's HIV status to the insurance company without the Claimant's consent;
  3. Whether the Respondent was justified to disclose the Claimant's HIV status to its employees, including the matron and its' staff in the finance office without the Plaintiff's consent.

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## Confidentiality/Privacy

### • B. O -vs- Meridian Equatorial Hospital Case No. HAT 005 of 2013 HIV and AIDS Tribunal at Nairobi

#### • Held

1. There was absolutely no social or moral duty to disclose the Claimants HIV status to her mother
2. The Claimant's medical records should not have been exposed to anyone who was not involved in her treatment and care, without her permission. The matron and the finance officer's access to the Claimant's information should have been restricted to their respective duties. Hence, the Respondent was liable for unlawful disclosure and breach of confidentiality
3. The disclosure to the insurer was wrongful, unlawful and unconstitutional. The disclosure violated the Claimant's rights under sections 18 and 22 of the HIV & AIDS Prevention and Control Act as read together with the provisions of article 31(1) (c) of the Constitution

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## Confidentiality/Privacy

### • B. O -vs- Meridian Equatorial Hospital Case No. HAT 005 of 2013 HIV and AIDS Tribunal at Nairobi

- Doctor-patient confidentiality was relevant as a statutory obligation, common law principle and constitutional standard. Article 31 of the Constitution expounded the right to privacy to include the right not to have information relating to one's private affairs revealed. Furthermore, section 22(1) of the HIV & AIDS Prevention and Control Act prohibited disclosure of information concerning the result of an HIV test or any related assessments to a third party without the subject's written consent, except where the subject was deceased, a minor, or incapacitated

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## Confidentiality/Privacy

### • B. O -vs- Meridian Equatorial Hospital Case No. HAT 005 of 2013 HIV and AIDS Tribunal at Nairobi

- **Hospitals had to establish full proof health information management systems.** In cases where their health information management systems had weaknesses that permitted other employees of the medical facility to access such confidential information, the facility would be forever exposed to such suits as may be instituted against them by their patients for breaches of their rights to privacy and confidentiality.

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## Confidentiality/Privacy

### • Y.B.A -vs- Brother Nicholas Banda and 3 Others Case No. 007 of 2012 HIV & AIDS Tribunal at Nairobi

- Every employer had to **take all necessary measures to protect the confidentiality of their employees** in line with the provisions of article 31 of the Constitution in case they received medical records containing information about their HIV status. The Claimant's medical records which contained information as to her HIV status had been **unnecessarily required by the 1<sup>st</sup> Respondent and thereafter unnecessarily revealed.** Furthermore, no lawful justification had been given for insisting that the record be furnished

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## Duties of employers and health service providers

### • Y.B.A -vs- Brother Nicholas Banda and 3 Others Case No. 007 of 2012 HIV & AIDS Tribunal at Nairobi

### • B. O -vs- Meridian Equatorial Hospital Case No. HAT 005 of 2013 HIV and AIDS Tribunal at Nairobi

- Duty to develop information management systems to prevent unauthorised disclosure
- Disclosure must be with the consent save where otherwise provided by law
- Disclosure without consent is on a need to know basis
- C.N.M -vs- The Karen Hospital Limited HIV and AIDS Tribunal at Nairobi Case No. HAT 008 of 2015
  - Disclosure to insurers permitted if the HIV AIDS condition is at an advanced stage and has implications on the viability of the medical cover

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### Duties of employers and health service providers

- **S 6. HIV and AIDS education as a healthcare service**
- (1) HIV and AIDS education and information dissemination shall form part of the delivery of healthcare services by healthcare providers.
- (2) For the purposes of subsection (1), the **Government** shall ensure training of healthcare providers on proper information dissemination and education on HIV and AIDS, including post-exposure prophylaxis for prevention of transmission.
- (3) The training of healthcare providers under this section shall include education on HIV-related ethical issues such as confidentiality, informed consent and the duty to provide treatment
- (4) The Minister for the time being responsible for matters relating to health shall, in collaboration with relevant stakeholders, provide guidelines for post exposure prophylaxis.

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### Duties of employers and health service providers

- **S 7. HIV and AIDS education in the workplace**
- (1) The **Government** shall ensure the provision of basic information and instruction on HIV and AIDS prevention and control to—
  - (a) employees of all Government Ministries, Departments, authorities and other agencies; and
  - (b) employees of **private and informal sectors**.
- (2) The information provided under this section shall cover issues such as confidentiality in the work-place and attitudes towards infected employees and workers

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### 9. HIV AIDS ISSUES AT THE WORKPLACE

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### HIV AIDS ISSUES AT THE WORKPLACE

- **Discrimination**
- **B.A -vs- Brother Nicholas Banda and 3 Others Case No. 007 of 2012 HIV & AIDS Tribunal at Nairobi**
- The Claimant had been discriminated against when she was terminated on grounds of redundancy yet the other employees with whom she was sacked with were brought back. Evidence adduced by both the Claimant and the Respondents confirmed that the other employees the Claimant had been terminated with were all brought back except the Claimant. That evidence demonstrated that she was being discriminated against on account of being HIV positive

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### HIV AIDS issues at the workplace

- The issues
- Non-discrimination
  - Pre- employment testing as a pre-condition for employment
  - Post- employment testing as a requirement for continued employment
  - Medical insurance
  - Termination on medical grounds
- Confidentiality of information on status
- Stigma
- Mandatory HIV AIDS education by employers
- 31. Discrimination in the workplace

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## CUEA CLS 301 HIV & AIDS Law

### 10.HIV AIDS ISSUES IN MARRIAGE

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## HIV AIDS ISSUES IN MARRIAGE

1. **Midwa v. Midwa (Kenya)**
  - Rights of spouses
2. **Reitmair v. Reitmair (Kenya)**
  - Rights of spouses
3. **Mmusi and Ors. v. Ramantele and Anor (Botswana)**
  - Customary practices

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## HIV AIDS ISSUES IN MARRIAGE

- S13 (1) Subject to this Act, no person shall compel another to undergo an HIV test.
- (2) Without prejudice to the generality of subsection (1), no person shall compel another to undergo an HIV test as a precondition to, or for the continued enjoyment of— (b) marriage
- Spouses cannot be accused of a sexual offence so mandatory testing under the sexual offences Act not possible
- Spouses not among those to whom the result of an HIV Test can be disclosed under section 18

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## HIV AIDS ISSUES IN MARRIAGE

- **Reitmair v. Reitmair [2001] LLR 2071 (HCK) 2002**
- The Petitioner petitioned the Court for dissolution of her marriage on grounds of cruelty. She had learned five years prior to the proceedings that her husband, the Respondent, had engaged in a sexual relationship with a woman suspected to be living with HIV. The woman and the woman's husband later died from the disease. The Petitioner urged the Respondent to be tested for HIV, but he refused. The Respondent began drinking heavily and on occasion took money from the Petitioner's business for personal use. The Petitioner and the Respondent had been living apart for five years
- Held
- On the unchallenged testimony of the claimant, the claim succeeded and the claimant was entitled to the orders sought

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## HIV AIDS ISSUES IN MARRIAGE

- **M.K.R -vs- C.W.R Case No. HAT 001 of 2015 HIV and AIDS Tribunal at Nairobi**
- The Claimant and Respondent had been in a relationship since 2012. In the course of their relationship, the Respondent and Claimant had engaged in sexual intercourse. According to the Respondent, the Claimant had declined to use condoms. The Respondent discovered later that the Claimant had been HIV positive and had failed to disclose her status earlier in the relationship. The Claimant alleged that the Respondent had been intimate with him with the intention of infecting him with the virus. After the Respondent had disclosed her status to the Claimant, the Claimant underwent tests which confirmed that he was HIV negative. The Claimant stated that the events caused him bodily harm, psychological and mental anguish and claimed damages against the respondent

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## HIV AIDS ISSUES IN MARRIAGE

- **M.K.R -vs- C.W.R Case No. HAT 001 of 2015 HIV and AIDS Tribunal at Nairobi**
- Held
- The fact that the Respondent refused to disclose her HIV positive status to the Claimant for several months during which they routinely engaged in unprotected sex was prima facie evidence of breach of duty of care on the part of the Respondent. It was clear from facts that the Respondent willfully and knowingly intended to infect the Claimant with HIV. Hence the Respondent had breached her duty of care to the Claimant

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## HIV AIDS ISSUES IN MARRIAGE

- **M.K.R -vs- C.W.R Case No. HAT 001 of 2015 HIV and AIDS Tribunal at Nairobi**
- Held
- Apart from the single incident when the Claimant alleged that he wanted to use a condom but the Respondent refused, there was no other attempt on the part of the Claimant to use a condom. That was an indication that the Claimant either assumed the risk of HIV infection or that he was reckless and had not bothered to take reasonable precautions for his own safety. Furthermore, he had never even bothered to inquire from the Respondent concerning her HIV status. Hence, it would have been wrong to hold the Respondent wholly responsible for the Claimant's misfortune

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## HIV AIDS ISSUES IN MARRIAGE

- **M.K.R -vs- C.W.R** Case No. HAT 001 of 2015 HIV and AIDS Tribunal at Nairobi
- Held
- Public policy required that every individual had to take responsibility for their own safety. It would be wrong for the Tribunal to impose upon HIV positive individuals, the duty of ensuring complete personal wellbeing of their HIV negative sexual partners. The duty of care that inhered upon the Respondent had to be complemented by the duty of the Claimant to take reasonable precautions for his own safety and to ask all relevant questions. The Claimant was also negligent because he failed to take reasonable precautions for his safety.
- Claimant awarded Ksh510,000/= less 75% contribution, therefore Ksh 127,500/=

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## CUEA CLS 301 HIV & AIDS Law

### 11.KEY POPULATIONS

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## KEY POPULATIONS

- **What are key populations**
- Groups of people who are at higher risk of HIV exposure, infection, and transmission (most-at-risk populations) and vulnerable populations, i.e., groups people who are disproportionately affected by HIV and its impacts, including HIV related discrimination. In most settings, key populations include: women, children, youth, people who use drugs, adults engaged in commercial sex, men who have sex with men, transgender people, and people under state custody
- HIV/AIDS Legal assessment tool American Bar Association(2011)

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## KEY POPULATIONS

- **According to KASF**
- Overall, the epidemic in Kenya is generalized and concentrated in some population.
- The epidemic is deeply rooted among the general population in **some regions** of the country while there is also concentration of very high prevalence among **Key Populations**.
- Prevalence estimates by county shows the **geographical variability** of HIV burden across the country
- HIV prevalence is highest among **women and men aged 25 to 44** demonstrating the increasing need of HIV treatment and care by age
- Among young people, the odds of being infected by HIV are higher among **young women aged 15-24** compared to young men

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## KEY POPULATIONS

1. Women
2. Youth
3. People who use drugs
4. Commercial sex workers
5. Men having sex with men
6. Persons in the custody of the state

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## KEY POPULATIONS

- **Women**
- Discrimination against women in public and private life constitutes both the cause and the consequence of contracting HIV and manifests itself through:
  - 1) A gender gap in education;
  - 2) Inequality in family and sexual life;
  - 3) Violence against women and harmful traditional practices;
  - 4) Barriers to health care; and
  - 5) Inequality in economic relations

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**KEY POPULATIONS**

- **Women**
- Women are
  - more likely than men to be stigmatized as “vectors of disease” or immoral and promiscuous for contracting HIV, irrespective of the source of infection.
  - frequently blamed for causing the deaths of their husbands and spreading the epidemic.
  - more likely to care for their ill family members, which increases the need for resources and contributes to the feminization of poverty

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**KEY POPULATIONS**

- **Rights of women in the context of HIV**
- 1. **LM, MI and NH v. Namibia (Namibia)**
  - Forced sterilization
  - Informed consent
- 2. **Law and Advocacy for Women in Uganda v. Attorney General (Uganda)**
  - FGM
- 3. **Democratic Republic of Congo v. Burundi, Rwanda and Uganda (African Commission of Human and Peoples' Rights)**
  - War crimes

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**KEY POPULATIONS**

- **Rights of women in the context of HIV**
- 1. **Midwa v. Midwa (Kenya)**
  - Rights of spouses
- 2. **Reitmair v. Reitmair (Kenya)**
  - Rights of spouses
- 3. **Mmusi and Ors. v. Ramantele and Anor (Botswana)**
  - Customary practices

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**KEY POPULATIONS**

- **children and youth**
- Main challenge for children is
  - mother to child transmission
  - Stigmatization
  - Discrimination
- Prevalence rates among the youth is very high because of risky behaviour

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**KEY POPULATIONS**

- **Rights of children and youth in the context of HIV**
- 1. **Association for Social Justice and Research v. Union of India and Ors. (India)**
  - Early marriages
- 2. **In re C (a child) (UK)**
  - Testing of children
  - Parental consent
- 3. **Nyumbani Children's Home v. The Ministry for Education and the Attorney General (Kenya)**
  - Right to education

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**KEY POPULATIONS**

- **Rights of children and youth in the context of HIV**
- **KELIN & 2ors vs CS Ministry of Health & 4 ors Nairobi Constitutional and Human Rights Division Petition NO.250 OF 2015**
- Compulsory testing and gathering of information on HIV status of school going children a violation of their rights unless conducted anonymously

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## CUEA CLS 301 HIV & AIDS Law

### 12.Criminalization

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### Criminalization

- **Part VI – Transmission of HIV HAPCA**
  - **S 24. Prevention of transmission.**
- **Aids Law Project v Attorney General & 3 others Nairobi Petition No 97 OF 2010 [2015] eKLR**
- S 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 is unconstitutional for being vague and lacking in certainty. The same is also overbroad and is likely to violate the rights to privacy as enshrined under Article 31 of the Constitution.
- **Sexual offences Act no 3 of 2006**
- S 26. Deliberate transmission of HIV or any other life threatening sexually transmitted disease.
- The constitutionality of this provision has not yet been tested

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### Criminalization

- **See also**
- S 152 PC Male person living on earnings of prostitution or soliciting
- S 154 PC Woman living on earnings of prostitution or aiding, etc., prostitution
- S 162 Unnatural offences.
- S165 PC Indecent practices between males

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### Criminalization

- Repressive social and legal environments
  - produce fear, perpetuate stigma, institutionalize discrimination,
  - limit HIV/AIDS funding,
  - obstruct global prevention efforts,
  - violate human rights, and
  - block effective responses to HIV/AIDS
- by driving people underground and away from HIV-related services
- Such environments reduce individuals' ability to avoid HIV infection and significantly impact the lives of PLHIV

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### Criminalization

- In countries where sex work, male-to-male sex, or possession of drug paraphernalia are criminalized, sex workers, MSM, and people who use drugs often fear prosecution and harassment by law enforcement authorities and avoid pharmacies, safe drug injecting sites, and health care centers where they can be spotted by the police.
- supportive and protective legal environments enable States to better respond to HIV/AIDS.
- Access of key populations to HIV prevention programs is generally better without repressive legal and social environments

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### Criminalization

- States are urged to consider taking the steps necessary towards the elimination of criminal and other laws that are counterproductive to HIV prevention, treatment, care and support efforts, or that violate the human rights of PLHIV and members of key populations. States are also urged to consider the enactment of laws protecting these persons from discrimination in HIV related services
- **UN Human Rights Council, Resolution on the Protection of Human Rights in the Context of HIV and AIDS para. 13 (2009)**
- States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted at vulnerable groups. In any event, criminal law should not be allowed to impede provision of HIV prevention and care services.
- **International Guidelines, Guideline 4 (1996)**

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## CUEA CLS 301 HIV & AIDS Law

### 13.The HIV & AIDS Tribunal

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### Jurisdiction of the HIV & AIDS Tribunal

- C. O. N & Another -vs- Africa Medical and Research Foundation Case No. HAT 006 of 2013 HIV and AIDS Tribunal at Nairobi
- Sections 26(1) and 27 of the HIV & AIDS Control and Prevention Act which vested the tribunal with jurisdiction to hear and determine complaints arising from any breach of the provisions of the HIV & AIDS Control and Prevention Act as well as "to hear and determine any matter that may be referred to it", conferred very broad powers. That phrase "to hear and determine any matter that may be referred to it" in section 27(1)(b) seemed to clothe the Tribunal with jurisdiction to entertain virtually any case referred to it as long as it was directly or indirectly related to a matter dealt with in the Act. Section 27(1)(b) ought to be interpreted sensibly. It could not be interpreted literally, but purposively having regards to the objectives and purposes of the HIV & AIDS Control and Prevention Act as set out in section 3 thereof

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### Jurisdiction of the HIV & AIDS Tribunal

- C. O. N & Another -vs- Africa Medical and Research Foundation Case No. HAT 006 of 2013 HIV and AIDS Tribunal at Nairobi
- Regarding the possibility of grounding their suit on the violations of the constitutional provisions of articles 28 (dignity), 31 (privacy) and 33(3) (reputation), the tribunal had no jurisdiction to enforce violations of those rights. Tribunals and all the other subordinate courts had no jurisdiction to interpret the Constitution or to enforce violation of constitutionally guaranteed rights until such a time as Parliament would enact a legislation to give them that power under article 23(2) of the Constitution. Therefore, it was not necessary to consider whether the matters complained about violated the provisions of articles 28, 31 and 33(3) of the Constitution, but whether those matters violated the Claimants' rights under common law.

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### Jurisdiction of the HIV & AIDS Tribunal

- C. O. N & Another -vs- Africa Medical and Research Foundation Case No. HAT 006 of 2013 HIV and AIDS Tribunal at Nairobi
- Article 169 of the Constitution and section 3 of the Judicature Act provided for the establishment and jurisdiction of courts. Accordingly, tribunals established by Acts of Parliament (such as the HIV & AIDS Tribunal) had the jurisdiction to apply common law and enforce the rights donated thereby. Thus the HIV and AIDS Tribunal had jurisdiction to enforce violation of the Claimants' rights under the common law tort of interference with the right to privacy and the common law tort of breach of statutory duties

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### Jurisdiction of the HIV & AIDS Tribunal

- C. O. N & Another -vs- Africa Medical and Research Foundation Case No. HAT 006 of 2013 HIV and AIDS Tribunal at Nairobi
- The matter before the Tribunal was a defamatory claim, a matter outside the jurisdiction of the Tribunal...The Tribunal had jurisdiction to deal with direct violations of provisions of the Act (the letter of the Act) as well as the indirect violations of the objectives and purposes of the Act as spelt out in section 3 thereof (the spirit of the Act). Defamation claims did not appear anywhere among the two broad categories mentioned. For that reason, the Tribunal declined to assume any jurisdiction over what was a defamatory claim

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### Jurisdiction of the HIV & AIDS Tribunal

- W.A -vs- Guru Nanak Ramgharia Sikh Hospital & 3 Others Case No. HAT 002 of 2015 HIV & AIDS Tribunal at Nairobi
- The 3rd and 4th Respondents filed a Statement of Defense and a Preliminary Objection. The preliminary objection was raised on grounds that the Tribunal lacked jurisdiction to hear and determine the dispute and that the Claimant was estopped from seeking further legal redress against the 3rd and 4th Respondent because he had already sought legal redress for the same under the provisions of the Employment Act 200
- The claims against the 3rd and 4th Respondents concerned alleged breach of section 31 of the HIV and AIDS Prevention and Control Act. Consequently, the tribunal had been clothed with jurisdiction to hear and determine the dispute. Any party who would be aggrieved by its decision had the discretion to appeal to the Employment and Labour Relations Court.

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### Jurisdiction of the HIV & AIDS Tribunal

- **Y.B.A -vs- Brother Nicholas Banda and 3 Others Case No. 007 of 2012 HIV & AIDS Tribunal at Nairobi**
- The Claimant was an employee of the Registered Trustee of Marist Brothers (4th Respondent) from 1992 until 1 December, 2012 when her employment was terminated. According to the Claimant, in 2003, she was requested by the 4th Respondent to submit her medical record for filing in her employment file. The employment file and medical records were to be accessed by other employees of the 4th Respondent. The Claimant's medical record contained her HIV Status which was HIV positive. According to the Claimant, information regarding her HIV Status was shared by the 1st Respondent to the 2nd Respondent. That action led to a series of discriminatory and derogatory actions directed at the Claimant by the 1st, 2nd and 3rd Respondents. The discriminatory, derogatory and humiliating conduct worsened after the Claimant's husband died in 2007

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### Jurisdiction of the HIV & AIDS Tribunal

- **Y.B.A -vs- Brother Nicholas Banda and 3 Others Case No. 007 of 2012 HIV & AIDS Tribunal at Nairobi**
- Among the issues for determination were the questions
  - Whether the tribunal had jurisdiction to entertain alleged violations of fundamental rights?; and
  - Whether the tribunal had jurisdiction to entertain matters touching on the violations of the provisions of the employment act?;
- The tribunal answered both questions in the affirmative

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### Jurisdiction of the HIV & AIDS Tribunal

- **Y.B.A -vs- Brother Nicholas Banda and 3 Others Case No. 007 of 2012 HIV & AIDS Tribunal at Nairobi**
- Some of the prayers by the Claimant fell within the provisions of both the Employment Act and the HIV and AIDS Prevention and Control Act. A literal reading of section 87 of the Employment appeared to remove the matter from the jurisdiction of the Tribunal. On the other hand, section 26 (1) (a) and 31 of the HIV and AIDS Prevention and Control Act seemed to vest the Tribunal with jurisdiction to determine the matter and grant prayers sought by the Claimant. **Those provisions introduced a conflict with regard to the right forum in which the matter could be resolved**

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### Jurisdiction of the HIV & AIDS Tribunal

- **B.A -vs- Brother Nicholas Banda and 3 Others Case No. 007 of 2012 HIV & AIDS Tribunal at Nairobi**
- Section 87 of the Employment Act was enacted with the intention of reserving all labour disputes, not just to experts on labour law, but to those who deeply understood the social and economic ramifications of labour disputes; whereas section 26 of the HIV and AIDS Prevention and Control Act intended to reserve all HIV related disputes (including all HIV related disputes arising in the workplace) not just to experts on HIV law, but to those who deeply understood the social, economic, medical and psychological ramifications of HIV related disputes.

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### Jurisdiction of the HIV & AIDS Tribunal

- **B.A -vs- Brother Nicholas Banda and 3 Others Case No. 007 of 2012 HIV & AIDS Tribunal at Nairobi**
- The Tribunal was **best placed** in terms of jurisdiction to handle matters related to HIV related discrimination and mistreatment in the workplace rather than the Industrial court. In addition, the Tribunal was composed of at least three advocates of the High Court of Kenya, each qualified to be appointed as a High Court judge, at least two medical practitioners, at least one person experienced in matters of HIV and AIDS, and finally, at least one person living with HIV virus. Hence, the Tribunal was equipped with the requisite intellectual resources to effectively address all legal, medical, social and psychological issues that could have emerged in the context of HIV and AIDS litigation. The Tribunal was better placed to adjudicate cases of violation of the rights of persons living with HIV and AIDS in the workplace as compared to a single judge of the Industrial Court.

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### Jurisdiction of the HIV & AIDS Tribunal

- **B.A -vs- Brother Nicholas Banda and 3 Others Case No. 007 of 2012 HIV & AIDS Tribunal at Nairobi**
- Article 22(1) expressly provided that "every person" had a right to "institute court proceedings" claiming that a fundamental right or freedom had been denied, infringed, violated or threatened. The provision had not limited the exercise of that right to the "High Court" and instead used the broader term, "Court proceedings". That expressly meant that such proceedings could be instituted in any court. According to the Constitution a "court" included a subordinate court which as per article 169 included local tribunals established pursuant to Acts of Parliament.

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### Jurisdiction of the HIV & AIDS Tribunal

- **J.K.M -vs- Dyncorp International Case No. 1 of 2013 HIV and AIDS Tribunal at Nairobi**

- The claimant instituted a suit against the respondent on the ground that his rights under section 13 and 33 of the HIV and AIDS Prevention and Control Act had been infringed and his fundamental rights under the Constitution had been violated. In response, the Respondent filed an application contesting the jurisdiction of the Tribunal. The Respondent relied on clause 20 of the Employment Agreement which provided that the contract was to be governed by and interpreted under the laws of commonwealth of Virginia, United States of America; and any dispute that arose under the contract had to be exclusively resolved in the Federal District Court of Virginia, if applicable, or the courts of the Commonwealth of Virginia.

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### Jurisdiction of the HIV & AIDS Tribunal

- **J.K.M -vs- Dyncorp International Case No. 1 of 2013 HIV and AIDS Tribunal at Nairobi**

- The main issues for determination by the tribunal were:
- What types of disputes had been expressly referred to the jurisdiction of the courts of the state of Virginia in the USA by the parties;
- What type of dispute was being referred to the tribunal by the Claimant;
- Whether there were special and exceptional circumstances that would justify the Tribunal's assumption of jurisdiction over the matter.

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### Jurisdiction of the HIV & AIDS Tribunal

- **J.K.M -vs- Dyncorp International Case No. 1 of 2013 HIV and AIDS Tribunal at Nairobi**

- The tribunal had no jurisdiction to entertain the claim for unlawful termination of contract of employment as this was caught by the ouster clause
- The tribunal had jurisdiction to determine the matters **not caught by the ouster clause**. Such disputes included claims for damages for violation of the Claimant's right to dignity, the Claimant's right to liberty and security of the person and the Claimant's right to privacy pursuant to the provisions either of the Constitution or the HIV and AIDS Prevention and Control Act. Such reliefs were available as against the Respondent in favour of any person who found themselves victims of such violation on account of acts or omissions of the Respondent, whether such persons were employees of the Respondent or not.

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### 14.REMEDIES FOR VIOLATION

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## END OF LESSON 4 THANK YOU FOR YOUR PARTICIPATION

FROM YOUR COURSE FACILITATOR  
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